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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883. 4

No. ~~371~~ 60

THE PEOPLE OF THE STATE OF CALIFORNIA EX REL. S. C. HASTINGS, PLAINTIFF IN ERROR,

vs.

A. P. JACKSON AND JOHN DEVLIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 10, 1881.

SUPREME COURT OF THE UNITED STATES.

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1, 2 In the Supreme Court of the State of California. Transcript on Appeal from the Seventh Judicial District, Solano County.

Complaint.

In the District Court of the Seventh Judicial District in and for the County of Solano, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, on the Information of J. L. Love, Attorney General, at the relation of S. C. Hastings,

vs.

A. P. JACKSON AND JOHN DEVLIN.

The above-named plaintiffs complain of the above-named defendants, and allege the following facts, constituting their cause of action:

That heretofore, to wit, on or about the 20th day of June, A. D. 1853, Isaac Thomas, then being the owner and holder of school land warrant No. 133, for 320 acres of land, issued under the act of the Legislature of the State of California, approved May 3d,
3 A. D. 1852, entitled An act to provide for the disposal of the 500,000 acres of land granted to the State by act of Congress, that the people of the State of California may avail themselves of the benefits of the eighth section of the act of Congress, approved April 4th, 1851, chapter 16, entitled An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights, the following provisions are hereby enacted:

The said warrant upon 320 acres of land, situated in Solano county and hereinafter described, and being desirous of locating the same upon a tract of land hereinafter described, did cause said lands to be surveyed and the lines thereof run off by line running north and south, east and west, and the said lines were duly designated by correct corners and distances, and a correct entry thereof was duly made in the office of the clerk of Solano county.

4 That said lands were duly surveyed by the county surveyor of Solano county, and the said surveyor did duly certify the same, in which certificate he set forth the bounds and number of acres set forth in such survey; and said certificate was duly filed and recorded in the office of the clerk of the county court of Solano county, and still remains of record therein.

That the description of said tract in said location contained and in said certificate is as follows: Commencing at the southwest corner of section 14, township 5 north, range 1 west; running from thence north 40 chains, from thence east 80 chains, from thence south 40 chains, from thence west 80 chains to the place of beginning—all of which are in township 5 north, range 1 west.

That the said lands were surveyed by the Government of the United States, and the plats of said survey were duly returned
5 and filed in the United States land office on or about the 1st day of October, A. D. 1853.

That the said lands did at the time belong to the United United

States, and had become subject to location, and that no error occurred in locating the same, but that said location ever since has been and still remains a valid location upon said lands.

And that upon the approval and filing of said township plats in the United States land office, the same became subject to location and selection under the laws of the United States, and thereupon, on or about the 24th day of December, A. D. 1853, said location was presented to the register of the United States land office of the district wherein the same was located, and was by him duly accepted and approved, and thereby said selection became valid and binding against the United States and the State of California.

That subsequently the said warrant No. 133 was duly filed in the office of the register of the United States land office for
6 the district where said land is located, and the word "surrendered" was written across the face thereof, and the register of the land office duly issued his certificate setting forth said facts.

That the location heretofore made by said Isaac Thomas has not been reversed or annulled, or in any wise impaired, but the same is valid and effectual and binding upon the United States and the State of California, and all persons claiming by, through, or under them.

That subsequently, to wit, on or about the 30th day of July, A. D. 1855, one Frederick Hall, by the consideration of the district court of the third judicial district in and for the county of Santa Clara, in said State of California, recovered judgment against said Isaac Thomas in a suit wherein said Thomas was impleaded with Oliver P. Watson and Timothy Sage for the sum of $1,864 debt, with interest and costs.

That afterwards, on the 10th day of June, 1858, said judg-
7 ment then being unsatisfied in whole or in part, execution was duly issued thereon and directed to and placed in the hands of the sheriff of Solano county for levy.

That under and by virtue of said execution the sheriff of Solano county did levy upon and advertise and sell all the right, title, and interest of said defendants in and to the lands above described to this plaintiff, and that no redemption was had thereon.

That subsequently, upon the expiration of six months after said sale, no redemption having been had thereon by said Isaac Thomas, or in his behalf, the said sheriff of Solano county duly executed under his hand and seal, and delivered to the plaintiff Hastings his deed, duly executed and acknowledged in manner and form sufficient to pass the title of said Isaac Thomas to said land, whereby he conveyed the said land and premises above herein described to said plaintiff Hastings.

That said conveyance was duly recorded in the recorder's
8 office of said Solano county on the 9th day of March, 1859, and that by virtue of the premises and of the said location the said plaintiff became, and ever since has been, and still is, the owner of said premises and entitled to the possession of the same, and that said defendants had due notice of said location and subse-

quent conveyance, and of the rights of the said plaintiff Hastings herein.

That on or about the 14th day of February, 1857, the said defendant Jackson, at the time well knowing of the existence of the prior location of said Isaac Thomas, by reason of Thomas' location being so recorded, and in the several offices mentioned, having due legal notice thereof, with intent to defraud said locator, did cause and procure two certain school warrants to be located upon the said premises, and afterwards, to wit, on or about the 18th day of March, 1863, did cause and procure a certificate of such location to
9 be issued from the Land Office of the United States, and presented the same to J. F. Houghton, the then register of the State land office, and requested of him the issuance of a certificate and patent thereon, and such proceedings were had by the said Jackson, and through the negligence and improper conduct of the said J. F. Houghton in the premises, that a certificate and patent for said tract issued afterwards, to wit, on or about the 20th day of March, A. D. 1863, under the seal of the State and under the hand of the Governor, whereby the State of California purports to convey the said lands and premises to A. P. Jackson under his pretended location as aforesaid.

And the said plaintiffs further allege that the said pretended patent of the said A. P. Jackson was obtained by him with full knowledge and notice of the claim of the plaintiff Hastings thereto, and of his prior rights in said premises as herein alleged, and was obtained by clandestine means and by surprise, and ought not to be binding.

That said Jackson, well knowing the rights of the plain-
10 tiffs, did, for the purpose of defrauding them of their rights in the premises, on or about the 10th day of March, A. D. 1863, make an application under the act of April 16th, 1859, entitled an act to provide for the issuance of patents to lands located with school land warrants, and for lands purchased under the act of April 23d, 1858, to the register of the State land office, for a certificate of location of certain school land warrants other than that under which said plaintiff Hastings claims, and for the evidence required by said act, that he was entitled to receive a patent for said tract, and that such proceedings were thereupon had that said certificate was issued to said Jackson, and by means of said certificate he procured a patent to be issued to him.

And the said plaintiffs allege that such proceedings were contrary to law and void, and in fraud of the rights of said Hastings in the premises, and were contrary to the usual course of issuing and
11 passing patents, and in express violation of law in this, that it is by law required that certain proofs shall be produced and made before the register of the land office prior to his issuing a certificate of location, and particularly it should be proved that notice of the application for such certificate has been made by publication in a public newspaper published within the county in which said lands are situated for at least four weeks next preceding such application, or if no newspaper is so published, then by written

notices posted in two conspicuous places on the land so applied for, and one upon the court-house door of said county; and upon proof of the foregoing fact, all persons holding adversely may be entitled to appear before the register and contest the application for such patent; and that thereupon, upon the production of said evidence and upon the surrender to the register of the school land warrant, and making the other proof required by said act, above cited, the register of the State land office issues the certificate of location and evidence that the application is entitled to a patent for the lands therein described, and upon the production thereof the Governor of the State issues a patent for the land, which said patent purports to vest in the grantee therein named a good and valid title to the lands therein described; whereas the said plaintiffs aver that no such proofs of publication were ever made, and that, in truth and fact, no such notice as is by law required, either by publication in a newspaper or otherwise, was ever made or had, and that the said school land warrants so located by Jackson, aforesaid, were not and never have been surrendered, and that the said J. F. Houghton, register of the State land office, wrongfully and negligently, and in violation of the law and of plaintiff's rights in the premises, neglected to require proof of said notice to be made, and that the plaintiff, Hastings, never had any opportunity, knowledge, or notice to appear and contest such application, or to be in any way heard therein.

That said land was listed by the United States to the State of California on the 10th day of February, 1870, long subsequent to the issuance of the patent by the State of California as aforesaid to defendant Jackson.

That on the 8th day of September, 1871, the Commissioner of the General Land Office canceled the location made by Jackson in February, 1857, for the reason that it conflicted with the prior location of Thomas, and the said Commissioner did at the same time return to the register of the United States land office, at San Francisco, school land warrant No. 133, and also the warrants located by defendant Jackson, with instructions to deliver back to said Jackson his said warrants. That on the 26th day of December, 1873, the said defendant Jackson received from the register of the United States land office his said school land warrants so returned as aforesaid, and did, as plaintiffs are informed and believe, on the second day of January, 1874, sell and dispose of the same for the sum of $458.00

That since the issuance of the said patent, the said N. P. Jackson has sold and conveyed all or the greater portion of the premises to the defendant Devlin, and has conveyed the same by deed purporting to convey a fee simple title; but plaintiffs aver that the interest of said John Devlin was acquired by him with full legal knowledge and actual notice of the fraudulent manner in which the said patent was issued to the said defendant Jackson, and of the claim of the plaintiff Hastings under the Isaac Thomas location.

Plaintiffs are informed and believe that the said Jackson retains some interest in the premises by mortgage or lien upon the premises

executed by said John Devlin to him to secure the payment of some portion of the purchase money.

That the issuance of said patent to defendant Jackson was
15 fraudulent, and was and is a direct fraud against these plaintiffs; that the said land was listed to the State by the United States on the I. Thomas location, and charged to the State by the United States as a part of the 500,000 acres granted by the United States to the State for school purposes; that the State has received nothing for said land; that no school land warrant or warrants has ever been surrendered in payment for the same on behalf of said Jackson.

And plaintiffs further allege that the said defendants ought to be decreed to deliver up the pretended grant or patent of the said premises to be canceled.

Wherefore plaintiffs pray that the said defendants be decreed to deliver up the said patent to be canceled, and that they, and each of them, and every person claiming by, through, or under them, or either of them, be perpetually enjoined and restrained from setting up any claim or title to the said premises under and by vir-
16 tue of said alleged patent.

And the plaintiffs have such other and further relief as they may be entitled to in the premises.

WM. S. WELLS AND GEO. A. LAMONT,
Attorneys for Plaintiffs.

Duly verified. Filed December 12, 1874.

JOEL A. HARVEY, *Clerk.*

17 *Demurrer.*

[Title of Court and Cause.]

The defendants, by their attorneys, demur to the complaint of the said plaintiffs, and for grounds specify the following:

First. That the said complaint does not state facts sufficient to constitute a cause of action, in this:

The performance of the acts stated in the complaint did not make valid selection of the premises mentioned in the complaint, under said school land warrant No. 133. No valid location of said warrant is shown, nor any valid selections of land under it.

The allegations in the complaint as to the effect of the pretended locations and the rights of I. Thomas and S. C. Hastings are mere conclusions of law and not allegations of facts.

The complaint shows upon its face that this action is barred by the Statutes of Limitation of this State.

The facts stated show that defendant, Jackson, was entitled to the patent when it was issued to him.

18 Wherefore defendants pray for judgment for their costs.

M. A. WHEATON AND J. McKENNA,
Attorneys for Defendants.

Filed January 14, 1875.

19 *Order Sustaining Demurrer.*

[Title of Court and Cause.]

The demurrer to the complaint herein having heretofore been argued, submitted, and taken under advisement by the court, now at this time, the court having fully considered the same, it is ordered that the said demurrer be, and the same is hereby, sustained, and that plaintiff be allowed thirty days in which to amend the complaint.

Entered May 19, 1875.

20 *Judgment.*

[Title of Court and Cause.]

In this case the demurrer to plaintiff's complaint having been sustained, and time given to amend said complaint, and such time having expired, now, at this time, on motion of counsel for defendants, made in open court, and upon plaintiff, by his counsel, declining to amend, it is order that defendants have judgment for their costs.

Wherefore, by virtue of the law, and by reason of the premises, as aforesaid, it is ordered, adjudged, and decreed that said defendants have judgment against said plaintiff, S. C. Hastings, for their costs incurred in this action, taxed at $3.40, in gold coin.

Judgment entered this 15th day of January, A. D. 1877.

Attest: JOEL A. HARVEY, *Clerk.*

21 *Notice of Appeal.*

[Title of Court and Cause.]

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of this State from the judgment therein made and entered in the said district court on the 15th day of January, A. D. 1877, in favor of the defendants in said action and against said plaintiff, and from the whole thereof.

Dated this 25th day of August, A. D. 1877.

Yours, etc.,

W. S. WELLS AND
GEO. A. LAMONT,
Attorneys for Plaintiff.

To the clerk of said district court, and Joseph McKenna, M. A. Wheaton, attorneys for defendants.

Endorsed: Filed August 25th, 1877. Joel A. Harvey, clerk.

Due service and receipt of a copy hereof admitted after filing, this 25th day of August, A. D. 1877, and undertaking on appeal waived.

M. A. WHEATON AND
J. McKENNA,
Attorneys for Defendants.

22 *Clerk's Certificate.*

OFFICE OF THE COUNTY CLERK OF THE COUNTY OF SOLANO.

I, Joel A. Harvey, county clerk and *ex-officio* clerk of the district court of the seventh judicial district of the State of California, in and for said county, do hereby certify the within and foregoing to be a full, true, and perfect transcript of the judgment roll and notice of appeal in the therein-entitled action, as the same remain of record and on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said district court, at my office in said Solano county, the 28th day of August, A. D. 1877.

[SEAL.] JOEL A. HARVEY, *Clerk.*

Endorsed: Due service of within transcript hereby admitted. September 28th, 1877. M. A. Wheaton and Jos. McKenna, att'ys for respondents.

Endorsed: Filed September 28th, 1877. D. B. Woolf, clerk, by H. P. Bush, deputy.

23 *Opinion of Department Two.*

In the Supreme Court of the State of California.

PEOPLE *ex rel.* HASTINGS *vs.* JACKSON *et al.* } 5793.

DEPARTMENT TWO.

[Filed June 16, 1881.]

PEOPLE *ex rel.* HASTINGS *vs.* JACKSON *et al.* } No. 5793.

Thomas, to whose interest the relator has succeeded, attempted in June, 1853, to locate a school land warrant upon the land in controversy. That attempt was made in the manner prescribed by the Legislature, but was ineffectual, because the land was then unsurveyed, and not subject to selection. (Hastings *vs.* Jackson, 46 Cal., 234.) On the first of the succeeding October, the land was surveyed by the Government of the United States. On the 24th of December, 1853, "said location was presented to the register of the United States land office of the district wherein the same was located, and was by him duly accepted and approved." This is characterized in Hastings *vs.* Jackson, *supra*, as an unauthorized proceeding, which no law, State or Federal, justified. In Hastings *vs.* Devlin, (40 Cal., 358,) the court said: "We know of no statute of California or of the United States authorizing the performance of the acts set forth in the certificate of Gift, register of the land office at Benicia, of December 24, 1853." It was accordingly held in Hastings *vs.* Jackson,

supra, that the plaintiff in that case, who is the relator in this proceeding, bore no such relations to the property, which was the same in that case as in this, as would entitle him to call in question the title of the defendants, who were the same in that case as in this.

In February, 1857, the defendant Jackson located two school land warrants upon the land, and obtained a patent for it from the State in March, 1863. The land was not listed by the United States to this State until February, 1870. In September, 1871, the United States Land Commissioner canceled Jackson's location and sent back to him the warrants which he had located on the land. This was done after the land had been listed to the State, and the commissioner had no power over the subject after that. (Hastings *vs.* Jackson, *supra.*) It does not appear that anything has transpired since the commencement of the action of Hastings *vs.* Jackson, *supra*, to change the relations which then existed between those parties, or to materially affect their rights in the premises. The grounds upon which the plaintiff in that case claimed relief are those upon which the plaintiff in this case claims relief, and the court in that case passed upon all the questions involved in this, except that it declined to consider whether the State could avoid its conveyance to Jackson, because the land was not listed to the State when he obtained the patent for it, or because no notice of his application to locate his warrants upon the land was published as required by law, for the reason that the plaintiff was not in a position to raise those questions.

A point, however, is raised in this case which does not appear to have been before considered, *i. e.*, that the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California," made Thomas' premature location valid. The argument, as we understand it, is that neither the defendant or the relator had acquired the title to the land prior to the passage of that act, and that the equity of the relator being the older is the stronger.

It must be admitted, we think, that the patent to Jackson was prematurely issued. Section 2 of the act of April 30, 1857, authorizes the issuance of a patent after the certification of the land located to the State. But we cannot see how the State could avoid the patent on that ground. After the land had been certified over to the State, the locator was entitled to a patent upon the presentation of a register's certificate, or other satisfactory evidence that his location had been duly made. A valid location might have been made after the land had been surveyed by the United States, and before the land was certified over to the State. That is, valid in the sense that if, after the location was made, the land was certified over to the State, the locator would be entitled to a patent. As between him and the State, his right to the land was fixed by a location upon it in the manner prescribed by the laws of the State. But the title remained in the United States until after the certification of the land over to the State. Before that event a patent from the State would not convey the title, for the obvious reason that the State had none to convey. Still, upon a valid location made after the survey and before the certification by the United States, the lo-

cator was in a position to demand and compel the issuance of a patent whenever the land so located should be certified over to the State. Therefore, if Jackson's location was a valid one, and no patent had been issued to him, he would be entitled to have one issued to him now. We are, therefore, unable to perceive that the State can avoid the patent heretofore issued on the ground that it was prematurely issued.

Aside from the claim that the relator acquired a prior and superior right to that of Jackson to the land, we find but one other objection to the validity of his location, and that is that no notice of his application to the register of the land office for a certificate of location was published as the law required it should be.

The law, however, does not make the validity of the certificate or patent dependent upon the publication of that notice, which was required to be given in order that adverse claimants might be heard in opposition to the application if they chose to be. But they were not concluded by the granting of the certificate, with or without notice. The State certainly was in no way prejudiced by the failure to publish such notice, and no one can take advantage of the omission without showing that he was in some way prejudiced by it. This objection was not pressed at the argument, and does not appear to be much relied on, although it is adverted to in one of the briefs.

The point upon which the learned counsel for the relator mainly rely is that the location of Jackson, although made after the survey of the land by the United States, was equally invalid with that of Thomas', which was made before said survey, because both were made before the land had been certified by the United States over to the State, and that neither would be valid, except for the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California."

If Jackson's location was invalid, Thomas undoubtedly has the superior right to the land under that act. But we are unable to discover that Jackson's location was invalid. It was not made until after the land had been surveyed, and, as we understand the law, a valid selection and location might then be made, and the person making it be entitled to a patent from the State, whenever the land so selected and located should be certified over to the State by the United States. If this view of the law be correct, it necessarily follows that the act of Congress last above referred to cannot be successfully invoked in behalf of the relator. No one will maintain, we think, that that act could be so construed as to affect a valid location made prior to its passage. It would cure the invalidity of Thomas' location if no intervening right had accrued in the meantime. But a valid location made between the date of Thomas' location and the passage of the act, would constitute an intervening right, which it was clearly not the intention of Congress to interfere with.

We think that the demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action,

was properly sustained, and that the judgment should be affirmed.

Judgment affirmed.

SHARSTEIN, *J.*

We concur:

MORRISON, *J.*

THORNTON, *J.*

Endorsed: Filed July 16th, 1881. Frank W. Gross, clerk. By C. Harlan, deputy.

24 *Judgment.*

In the Supreme Court of the State of California, June 16th, 1881. No. 5793. Department Two.

THE PEOPLE OF THE STATE OF CALIFORNIA, on the information of J. I. Love, Attorney General, at the relation of S. C. Hastings, Appellants.

vs.

A. P. JACKSON AND JOHN DEVLIN, Respondents.

On Appeal from the District Court of the 7th Judicial District in and for the County of Solano.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Sharpstein, J.—Morrison, C. J., Thornton, J., concurring.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the 7th judicial district in and for the county of Solano, in the above-entitled cause, be, and the same is hereby, affirmed with costs.

25 *Assignment of Errors.*

In the Supreme Court of the United States. Of the October Term, in the year of our Lord one thousand eight hundred and eighty-one.

PEOPLE *ex rel.* S. C. HASTINGS, Plaintiffs in Error,

vs.

A. P. JACKSON *et al.*, Defendants in Error.

Afterwards, to wit, on the second Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said plaintiff in error, by W. W. Cope, his attorney, and says that on the record and proceedings aforesaid there is manifest error in this, to wit:

26 First. The supreme court of the State of California, in their opinion filed June 16th, 1881, recognize the decisions of the same court in Hastings *vs.* Jackson, 46 Cal., 234, and Hastings *vs.* Devlin, 40 Cal., 358.

Second. The rulings of the court in the above cases, and especially in *this* case, are in violation of the act of Congress providing for the admission of the State of California, by the terms of which the State covenanted not to interfere with the primary disposal of the lands of the United States.

Third. The court failed to pass upon the validity of relator's (Thomas') selection of the premises on the 24th day of December, 1853.

Fourth. The court usurp the jurisdiction of the Land Department of the United States on the question of selection or location, and disregard the decision of the Commissioner of the General
27 Land Office who approved the selection made by said Isaac Thomas, (relator's grantor,) and who certified the same to the State upon said selection on 10th day of February, 1870.

Fifth. The court held that neither the defendant nor the relator had acquired the title to the land prior to the passage of the act of Congress of July 23d, 1866.

Sixth. The court decided that the State could not avoid the patent, though void and irregular.

Seventh. The court decided that Jackson's location was a valid one, and that he would now be entitled to a patent, notwithstanding Jackson never did surrender his warrant to the Land Department, and subsequent to his pretended location disposed of his warrant to other parties.

Eighth. The court hold that Jackson could obtain a patent on his location of his warrant, though the same warrant was
28 withdrawn, and that it is not necessary to surrender the warrant prior to obtaining such patent as required by statute.

Ninth. The court holds that the notice required of four weeks prior to obtaining a patent is not necessary for the validity of a patent.

Tenth. The court holds that the State is not prejudiced by a failure to publish such notice.

Eleventh. The court holds that the act of Congress of July 23d, 1866, renders Jackson's subsequent location valid, and that he (Jackson) is entitled to a patent without *surrendering* his warrant whenever the land should be certified over to the State.

Twelfth. The court holds Jackson's right absolute when it plainly appears that his right is only inchoate, if he had any, and now absolutely void by a subsequent sale of his warrant.

Thirteenth. The court decided that Jackson's patent, though irregular and void at the time when it was issued, shall stand, and yet the court failed to notice that the title certified to the
29 State of California by the Commissioner of the General Land Office was based upon the Thomas (Hastings) location, and the surrender of his (Thomas) land warrant, and that the State became a trustee of the title so transmitted for the relator, and for his benefit, and that if Jackson acquired by his patent the said title he is a trustee for the relator.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said A.

P. Jackson, and John Devlin, defendants in error, against the said the People of the State of California upon the relation of S. C. Hastings, the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error against the said defendants in error: and the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, &c.

W. W. COPE,
Attorney for Plaintiff in Error.

30 *Bond.*

In the Supreme Court of the State of California.

Know all men by these presents, that we, R. P. Hastings and R. B. Wallace, of the city of San Francisco, State of California, are held and firmly bound unto A. P. Jackson and John Devlin in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said A. P. Jackson and John Devlin, their executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the sixth day of September, A. D. one thousand eight hundred and eighty-one.

The condition of the above obligation is such, that whereas
31 lately at a supreme court of the State of California, in a suit pending in said court between The People of the State of California, upon the relation of S. C. Hastings, plaintiff, and said A. P. Jackson and John Devlin, defendants, a judgment against said plaintiff was rendered, and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment in said suit, and a citation, directed to said defendants, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October, 1881; now if said plaintiff shall prosecute said writ to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

R. P. HASTINGS. [SEAL.]
R. B. WALLACE. [SEAL.]

Signed, sealed, and delivered in presence of—
A. F. BENJAMIN.

32 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss.*:

R. P. Hastings and R. B. Wallace, being duly sworn, depose and say, and each for himself deposes and says, that he is worth the sum

of five hundred dollars over and above all his just debts and liabilities.

R. P. HASTINGS.
R. B. WALLACE.

Sworn to before me, this sixth day of September, 1881.

[SEAL.] A. F. BENJAMIN, *Notary Public.*

I approve the within bond and the sufficiency of the sureties thereto.

R. F. MORRISON, *C. J.*

Endorsed: Filed September 7, 1881. F. W. Gross, clerk. By J. B. Martin, deputy.

33 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said supreme court before you, between The People of the State of California upon the relation of S. C. Hastings, plaintiff, and A. P. Jackson and John Devlin, defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf.

You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washing-
34 ton, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court, to be there and then held; that the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fifth day of September, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the 106th.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE,
Deputy Clerk of U. S. Circuit Court, District of California.

The above writ of error is hereby allowed.

R. F. MORRISON,
Chief Justice of Supreme Court, State of California.

Endorsed: Supreme Court of the United States. The People of the State of California *ex rel.* S. C. Hastings *vs.* A. P. Jackson and John Devlin. Writ of error. Filed September 6, 1881. F. W. Gross, clerk. By J. B. Martin, deputy.

35 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To A. P. Jackson and John Devlin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1881, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein the People of the State of California, upon the relation of S. C. Hastings, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this sixth day of September, A. D. 1881, and of the Independence of the United State the 106th.

R. F. MORRISON.
Chief Justice of the Supreme Court of the State of California.

36 Service of the within citation is admitted this eighth day of September, 1881.

JOSEPH McKENNA
& M. A. WHEATON.
Attorneys for Defendants and Respondents.

Endorsed: Supreme court State of California. The People of the State of California *ex rel.* S. C. Hastings *vs.* A. P. Jackson and John Devlin. Citation. Filed September 10, 1881. F. W. Gross, clerk. By J. B. Martin, deputy.

37 *Clerk's Certificate.*

In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* S. C. HASTINGS, Appellants,
vs.
A. P. JACKSON *et al.*, Respondents. } 5793.

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that the foregoing thirty-six pages number from 1 to 36, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled.

and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said supreme court of the State of California, this 24th day of September, 1881.

[SEAL.] FRANK W. GROSS, *Clerk.*
By C. HARLAN, *Deputy Clerk.*

Endorsed on cover: California supreme court. No. 371. The People of the State of California *ex rel.* S. C. Hastings, plaintiff in error, *vs.* A. P. Jackson and John Devlin. Filed 10th October, 1881.

No.

In the Supreme Court

of the

United States.

The People of the State of California, on the information of J. L. Love, Attorney General, at the relation of S. C. Hastings,

Plaintiff in Error,

vs.

A. P. Jackson and John Devlin,

Defendants in Error.

In Error to the Supreme Court of the State of California.

BRIEF FOR THE PLAINTIFF IN ERROR.

JOHN NORTON POMEROY,
Of Counsel.

Filed, ...*1884.*

.....*Clerk.*

By .....*Deputy Clerk.*

San Francisco:
Printing Department of A. L. Bancroft & Company.

1884.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

The People of the State of California, on the information of J. L. LOVE, Attorney General, at the relation of S. C. HASTINGS,
Plaintiff in Error,

vs.

A. P. JACKSON and JOHN DEVLIN,
Defendants in Error.

In Error to the Supreme Court of the State of California.

BRIEF FOR PLAINTIFF IN ERROR.

PRELIMINARY STATEMENT.

This action was brought in the State Court of California by the People of the State of California on the relation of Hastings, to establish the title of Hastings to a certain tract of land in that State

under a location made by means of a State school land warrant on the 500,000 acres of public lands granted to the State by the United States, and to set aside a patent for the same tract improperly issued by the State to the defendant Jackson.

All the material facts are contained in the "statement of facts" next following.

The theory of the action is that the State sues as a trustee of an express trust for the relator Hastings, and that his title, and the title of the State *as his trustee*, is claimed to arise and does arise directly from certain acts of the U. S. Congress, which title and claim the State Court has denied. The action was begun December 12, 1874.

See Complaint, Transcript, pp. 1–5.

Defendants demurred on the ground that the complaint does not state facts sufficient to constitute a cause of action.

Transcript, p. 5, fol. 17.

The demurrer was sustained and a judgment was entered thereon dismissing the action, on January 15, 1877.

Transcript, p. 6, fol. 19, 20.

The plaintiff thereupon appealed to the Supreme Court of the State of California from this final judgment, and such proceedings were thereupon had in said Supreme Court that it rendered its

final judgment affirming the judgment appealed from in all things, on June 16, 1881.

Transcript, p. 6, fol. 21, the appeal.
Transcript, p. 10, fol. 24, judgment of State Supreme Court.

A copy of the opinion of the State Supreme Court in rendering its final judgment of affirmance, is given.

Transcript, pp. 7–10.

A writ of error upon said final judgment of affirmance was thereupon issued to the Supreme Court of the State of California, on September 6, 1881, and the record was brought into the Supreme Court of the United States for review.

Transcript, pp. 13, 14, writ of error, citation, and certificates.
Transcript, p. 12, fol. 30, bond, etc.

The special assignments of errors are set out in the Transcript, pp. 10–12, fol. 25–30.

While some of these assignments of error are doubtless superfluous and perhaps unavailing, the questions of law upon which we rely, and which are contained in the subsequent brief, are fairly raised by the following-named assignments, viz.: the third, the fourth, the fifth, the seventh, the ninth, the tenth, the eleventh, the twelfth, and the thirteenth. The questions are also sufficiently raised under the final general assignment (fol. 29),

viz.: that the judgment was given for the defendants in error against the People of the State on the relation of Hastings, the plaintiff in error, whereas the judgment ought to have been given for the said plaintiff in error.

STATEMENT OF FACTS.

On June 20, 1853, one Thomas owned a school land warrant, No. 133, for 320 acres of land, issued under the act of the State of California of May 3, 1852, providing for the disposal of 500,000 acres of land, granted to that State by act of Congress of April 4, 1841, ch. 16.

On that day said Thomas located said warrant on the lands in controversy, situated in Solano County, State of California. This location was regular in form, and was made in the manner prescribed by the statute.

The lands comprised in said location at the time belonged to the United States, and had not then been surveyed by the U. S. authorities.

Subsequently, in the same year, the lands comprised in said location were duly surveyed by the U. S. Government, and said survey was completed and the plats thereof were duly filed in the U. S. land office, on Oct. 1, 1853.

After such survey, and on December 24, 1853, said location, so originally made by Thomas, was presented to the register of the U. S. land office of the district in which said lands were situated,

and within which said location was made, and was by him duly accepted and approved. All this was done years before any step was taken by defendent with respect to these lands.

Subsequently to this last-mentioned proceeding, the said warrant No. 133 was duly filed in the office of the register of the U. S. land office, for the same district where the land was located, the word "surrendered" was written across the face thereof, and said register duly issued his certificate, setting forth these facts.

This location has never been revoked or annulled, or in any way impaired.

(Transcript, pp. 1 and 2.)

The relator Hastings acquired all the right, interest, and estate and title of the said Thomas, by means of an execution sale, made upon a judgment duly recovered against said Thomas, and a sheriff's deed of the property, given upon such sale by the sheriff of Solano County to said Hastings, which deed was duly recorded in said county March 9, 1859.

(Transcript, p. 2, folios 6–8.)

The defendant Jackson, at all the times and during all the transactions and proceedings by him hereinafter to be mentioned, had full notice and knowledge of all the foregoing facts and transactions, and of the rights of Thomas and Hastings in and to the lands in controversy.

Afterwards, and on February 14, 1857, the defendant Jackson, with full notice and knowledge of Thomas' prior location, and of the proceedings connected with it, caused two certain other school land warrants to be located on the same lands in controversy.

And on March 18, 1863, he procured a certificate of his said location, from the U. S. land office, and presented the same to T. F. Houghton, who was the register of the State land office of the State of California.

Such proceedings were had with said Houghton, that on March 20, 1863, a certificate and patent for said lands in controversy were issued, under the seal of the State and hand of the Governor, whereby the State of California purported to convey the said lands to the said Jackson. Said patent was obtained by said Jackson, after and at the time he had full notice and knowledge of all the previous facts and proceedings, and of the rights and claims of the relator Hastings, as before stated.

(Transcript, p. 3.)

At the time when such patent was issued to Jackson, the legal title to said lands still remained in the U. S., and the lands comprised in said patent, being the lands in controversy, had not yet been "listed" by the U. S. to the State of California. Said lands were not "listed" by the U. S. to the State of California until February 10, 1870.

(Transcript, p. 4, folio 13.)

On September 8, 1871, the commissioner of the U. S. general land office canceled the location made by Jackson in 1857, on the ground that it conflicted with Thomas' prior location. Said commissioner at the same time returned to the register of the U. S. land office in San Francisco the school warrants with which Jackson had made his said location, with instructions that they should be delivered back to Jackson. On December 26, 1873, such warrants were so returned to Jackson, and he afterwards sold and disposed of them to third persons for $458.

(Transcript, p. 4.)

After the issuance of said patent to Jackson, he conveyed by deed a portion of said land to the defendant Devlin, but Devlin took with full notice and knowledge of Hastings' prior claim and rights.

(Transcript, p. 4, folio 14.)

In procuring his certificate from the State register and his patent as aforesaid, said Jackson failed to comply with the provisions of the statute prescribed in such cases, viz.: he failed to give and publish the requisite notices, and to furnish the requisite proof thereof to the said register, so that the relator Hastings never had an opportunity to contest defendant's application for a patent before said register.

(See allegations in detail.)

(Transcript, pp. 3, 4, folios 11, 12.)

(See also the allegation concerning Jackson's proceedings in Transcript, p. 3, folio 10.)

It is plain from the foregoing facts that the U. S. land officers, the district registers, and the commissioner of the general land office have uniformly recognized and treated Thomas' location as valid, at all events as conferring superior rights so as to nullify the subsequent location of defendant Jackson.

Whatever powers the State officers may have under the State statute, they are all derived from the statute of Congress, and are based upon the acts of the U. S land officials.

Yet the State Supreme Court, in this and in the previous cases arising out of the same transactions, has brushed aside as of no value all these acts of the U. S. land officers in dealing with Thomas' location, which were done *after* his original location on June 20, 1853.

The relator Hastings' cause of action is a claim, right, or title arising directly under statutes of Congress, and acts of U. S. officials done in pursuance of such statutes, which the State court has persistently rejected, denied, and declared not to exist.

For two previous cases growing out of the same transaction, in which the relator Hastings has endeavored to enforce his claim, and in which the Supreme Court has decided adversely to him, see

Hastings *v.* Devlin, 40 Cal. 358, and

Hastings *v.* Jackson, 46 Cal. 234.

PRELIMINARY POINTS AS TO FORM OF THE ACTION.

First Point.—Congress having adopted the practice and pleadings of the State courts, the principles of the reformed procedure must govern in all matters of form. It is a fundamental principle of the codes of procedure in California and all the other code States, that the *facts alleged*, and not the prayer for relief, nor the nature of the action as conceived by the pleader, determine the plaintiff's rights. If a plaintiff supposes that he has a legal cause of action, and frames his complaint on the assumption that the action is legal, and prays a common-law judgment, and no equitable remedy of any kind, but actually states no legal cause of action and no basis for legal relief, but *does* allege facts which entitle him to any equitable relief; then if the facts as alleged are proved at the trial or are admitted by demurrer, the equitable remedy to which he is entitled will be awarded. The exact converse of this is equally true. In either case, the court, disregarding the demand for judgment and the supposed nature of the action, will rely upon the *facts* alleged and proved or admitted as the basis of its appropriate remedy. There were some early *dicta* in opposition to this rule; but it is now established as one of the very corner-stones of the reformed procedure.

See Pomeroy's Remedies, etc., § 83, also § 82.

Emery *v.* Pease, 20 N. Y. 62, 64.

Smith *v.* Bodine, 74 Id. 30.

Williams *v.* Slote, 70 Id. 601.

Barlow *v.* Scott, 24 Id. 40, 45.

Mackey *v.* Auer, 8 Hun, 180.

Leonard *v.* Rogan, 20 Wis. 540, 542.

Harrall *v.* Gray, 10 Neb. 186.

Parker *v.* Jacobs, 14 S. C. 112.

Lewis *v.* Soule, 52 Iowa, 11.

Whiting *v.* Root, 52 Id. 292.

White *v.* Lyons, 42 Cal. 279.

Blood *v.* Fairbanks, 48 Id. 171, 175.

Second Point.—Futhermore, in a purely legal action, that is, in an action where the plaintiff relies on a legal title or right, and asks a purely legal remedy, he may still invoke the aid of any equitable right or title, or any equity which he holds or of which he may avail himself, in order to maintain his contention, and thereby obtain relief, even though it be legal.

See Pomeroy's Remedies, § 85.

Sheehan *v.* Hamilton, 2 Keyes, 304; 3 Abb. Pr., N. S., 197.

Arthur *v.* Homestead Ins. Co., 78 N. Y. 462, 467.

The case of Sheehan *v.* Hamilton, which was an action of ejectment, is a striking illustration of this principle.

Although the pleader seems to have conceived of this suit as an action at law in the nature perhaps of a *scire facias*, brought to annul the patent granted to the defendant Jackson, yet as the relator Hastings is the real party in interest, under the foregoing well-established principles, he can avail himself of any equities or equitable title held by him, and can obtain any equitable relief to which, under the facts alleged and admitted by the demurrer, he may be entitled.

POINTS ON THE MERITS.

First Point.—By his original location on June 20, 1853, although before the lands were surveyed by the U. S. Government, in connection with the renewal thereof on December 24, 1853, after the lands were thus surveyed, Thomas acquired *at least* an equitable interest, estate, or title in the lands in controversy, good as against all private persons. By Jackson's subsequent location of the same lands on February 14, 1857, and by his certificate from the State land officer and patent from the State, obtained on March 20, 1863, while the legal title to the said lands was still held by the United States, *and nearly seven years before said lands were "listed" by the* United States to the State of California, the defendant Jackson acquired *at most* only an equitable interest, estate, or title in or to the lands in controversy, of no higher nature intrinsically than the equi-

table interest of Thomas. Since Thomas' equity was prior in point of time, and since Jackson took with full notice and knowledge of Thomas' rights, Thomas' equity, now held by the relator Hastings, is, upon the familiar doctrines of equity jurisprudence, the superior one, and must prevail over any equity otherwise acquired by the defendant Jackson. And even if, through the doctrine of "relation" or otherwise, Jackson has acquired the legal title to the lands in controversy, he acquired and holds such legal title charged with and in complete subordination to the prior and superior equitable interest of Thomas now vested in the relator Hastings.

The California Court has discriminated most harshly between the positions of Jackson and of Thomas, which are really the same in contemplation of law. The Court has given Jackson the benefit of a doctrine which they utterly deny to Thomas. While admitting that Jackson acquired no legal title by his patent from the State at the date of its issue, years before the legal title to the lands was transferred from the United States to the State by the process of "listing," the Court hold that when the legal title was thus transferred to the State in 1870, it related back to Jackson's patent issued in 1863, inured to the benefit of Jackson's title, and vested the full legal title in him *as though conveyed to him at the date of his patent.* But the Court refuse to give Thomas and the relator any benefit of this same doctrine of relation;

they wholly ignore the application of this doctrine to the circumstances of Thomas' location and other proceedings; they pass it by in complete silence.

And yet it is difficult to see why the doctrine of relation should aid one of these parties and not the other. I submit that Thomas and Hastings are as much entitled to invoke the aid of that doctrine in perfecting their claim as the defendant Jackson is.

What is the real nature and situation of Thomas' claim to these lands?

The Supreme Court of California, holding that Thomas' original location on June 20, 1853, was a nullity because made before the lands had been surveyed, dismissed the subsequent proceeding of Thomas done on December 24, 1853, *after the survey*, in almost a contemptuous manner, as being plainly without any legal effect. They call it "an unauthorized proceeding, which no law, State or Federal, justified," and say of it, "We know of no statute of California or of the United States authorizing the performance of the acts set forth in the certificate of the register of December 24, 1853."

Assuming that there is no statute expressly authorizing such proceeding (which I do not admit; the proceeding was virtually authorized, as I shall show), would that fact necessarily render the whole proceeding a nullity?

The original location by Thomas on June 20, 1853, was undoubtedly imperfect, incomplete, and under some circumstances unavailing, because the

lands had not then been surveyed. The exact legal and equitable effect of this location I shall endeavor to show in the sequel.

After the lands were duly surveyed, Thomas took a step which is thus described in the complaint: After said survey, "on or about December 24, 1853, *said location* (that is, the original location of June 20, 1853, described in preceding allegations) was presented to the register of the U. S. land office of the district wherein the same was located, and was by him duly accepted and approved," and the said warrant No. 133 was duly filed in the office of said register, the word "surrendered" was written across its face, and the said register thereupon issued to Thomas his certificate setting forth all that had been done.

These allegations are doubtless somewhat inartificial when judged by the strict rules of common-law pleading. But it should be carefully remembered that the old common-law rule that allegations must be construed strictly against the pleader has been wholly abrogated by the codes. The rule of the codes is, that all allegations must be construed fairly and reasonably, so as to promote justice. This passage must therefore be considered as sufficiently averring all the material facts which could be proved under it on the trial. Its fair and reasonable meaning is, that on the 24th of December, 1853, Thomas presented or laid before the proper register all the papers and documents comprised in or used in the former location

made on June 20th; that is, he laid before the register the location on file in the office, and also the original certificate issued by the register on the prior location, which papers described all the lands located, and were in every respect regular on their face. The school land warrant was then delivered up, filed, and canceled; and the register thereupon issued to Thomas a second certificate, setting forth the facts, and showing that the location had thus been renewed and made a second time, after the survey.

What is the legal effect of this?

If a person regularly goes through the process of locating a warrant on United States lands, but the location is imperfect because the land has not yet been surveyed by the United States authority, and is therefore not yet in the market; and if, after said lands have been fully surveyed, and before any third person intervenes and acquires any rights to such land, the same person, by means of the same warrant, regularly goes through the process of locating the same tract a second time, as though the first location had never been made, can it be pretended that the second or renewed location would not be perfectly valid against the United States and against all third persons? Can it be pretended that by the first location, before the land was surveyed, the warrant would be exhausted of its efficacy so as to prevent a second or renewed formal location of the same tract after the survey, and before any third persons had interfered? And

is it necessary that the statute should expressly authorize or even mention such a renewed location? Is not the single statutory provision prescribing the mode of location a sufficient authority for such a second or renewed location, whenever the first one was insufficient because the requirements of the statute as to a survey had not been complied with?

I submit, therefore, that if Thomas, on December 24, 1853, had gone through the proceeding of locating the same tract a second time, exactly repeating all the steps which he took on the former location, and thus following the directions of the statute as though no previous location had ever been made by him, then such location would have been perfect, and would have given him all the rights against the United States, against the State, and against third persons which can be acquired by any locator. His prior equitable title to the tract, as against the United States and the State, would have been perfect under the statutes.

I further submit, that, from the allegations of the complaint, *this is substantially, even if not exactly, what Thomas did perform* on the 24th of December, 1853. He substantially, even if not exactly, did repeat all the steps required for making a location *de novo*. His proceeding, then, on December 24th, was in reality a *renewal* of the location which he had *imperfectly* made on the preceding June 20th.

By the original proceeding of June 20th, which

entirely conformed to the statute in all matters of form, documents were filed in the register's office showing the location as made by Thomas, describing the 320 acres taken by him, etc., etc., and a certificate of the same as evidence of his rights and interest was given to him by the register.

On the 24th December, according to the plain meaning of the allegation, these same papers composing the "location" were presented by Thomas to the register, and were duly accepted and approved by the register; the land warrant was given up by Thomas, filed in the register's office and canceled; and the register gave Thomas a certificate, which was in reality and in legal effect a certificate of this renewed and perfected location made on December 24, 1853. The documents were used and treated as though they had then been drawn up for the first time; and certainly Thomas' rights cannot be defeated simply because the original documents were used over again instead of drawing up new ones, which would have been exact copies except in their dates.

This proceeding was in reality and in legal effect a second or renewed location of the same tract made by Thomas. It was so treated by the U. S. land register at the time; it was so treated by the U. S. commissioner of the general land office in 1871, when he canceled the location made by Jackson in 1857, on the ground of its being in conflict with this prior location by Thomas.

I submit that the State Court has no power thus to disregard and set aside the official acts of the U. S. officers—done in this manner—in the discharge of their official functions. It is the province of the U. S. officers to decide whether a location made upon U. S. lands is valid or invalid.

The proceeding of December 24, 1853, instead of being "unauthorized, and which no law, State or Federal, justified," was as really and truly within the authority of the statute as any location could be; since it was, in its substance, even if not in its exact outward form, a new "location," and nothing more.

I reach the following conclusion from this branch of the analysis. The original imperfect location of June 20, 1853, together with the subsequent proceeding of renewal on December 24, 1853, made after the survey, and long before any third persons had intervened, substantially amounted to a completed, valid, prior location under the statute of the lands in controversy, a location which has always been regarded and treated as valid by the U. S. officers of the land department. They clothed Thomas at least with a prior and perfected equitable interest, estate, and title to the land, good as against the United States, the State of California, and all private persons except subsequent grantees of the legal title who should take without any notice of this prior equity. Since Jackson's location was subsequent to that of Thomas; and since the patent from the State was

issued to him before the State had obtained any legal title from the United States, and since Jackson took all his proceedings with full notice and knowledge of Thomas' prior equity held by the relator, Jackson never obtained anything more than an equitable interest, which was always inferior, and subject to that held by the relator. And if Jackson has finally acquired the legal estate in the land by his patent, he acquired and holds that legal estate subject to the prior equitable estate of the relator. He holds the land as a constructive trustee for the relator; and the relief should be granted of canceling his patent, and compelling him to convey the legal estate to the relator. And finally, if the vesting of the legal title in the State in 1870 can relate back so as to validate Jackson's patent, if there had been no prior claim to the land; by the same reasoning it must relate back and sustain the prior equity of the relator, and make *his* prior equitable interest under his renewed location perfect and complete, as against the State of California.

But there is another view: Suppose I am emtirely wrong in the effect which I have attributed to the proceeding on December 24, 1853. Suppose that this cannot be regarded as a renewed location to any extent; but that it was, as said by the State Court, an act wholly unauthorized by any law as a means of rectifying or supplementing the original location of June 20, 1853. In other words, suppose that the relator's

equitable claim to the land must rest solely upon this original location, and cannot be strengthened by the subsequent proceeding on December 24, 1853. I will assume these positions for the purpose of the argument.

I am then to inquire: What was the real nature and effect of the original location, made on June 20, 1853, before the lands were surveyed by the U. S. government? The Court below speaks of it as being an absolute nullity, from which no rights did or could arise against any one; as being to all intents and for all purposes inoperative and void. Is this the true view? I submit that it is not. No decision of the U. S. Supreme Court, so far as I am informed, has held that such a location is an absolute nullity; nor is there any decision from which this conclusion is a necessary inference.

The following seems to be the fair result of the various decisions on the subject made by this Court: A location made on lands of the United States, before they have been duly surveyed by the U. S. government, is inchoate, unavailing, and imperfect, so far that the locator acquires no vested right against the United States. The United States may withdraw the lands included in the location from public sale, may expressly grant them to third persons, may reserve them, etc., and thus cut off the inchoate rights of the locator, and he would have no claim or redress. But on the other hand, if the United States took none of

these steps, if after the premature location the lands should be regularly surveyed by the U. S. government, and should be kept open for sale, entry, or location, *and no third person had intervened in any way with the specific tract thus located before the survey*, then, if the locator, after the survey, should reassert his right under his original location, and should claim the tract which he had thus located, the governmental survey, I submit, would relate back and validate his original location, and thus make his equitable title to the land perfect, even as against the government. At all events, this seems to be the principle settled by the decisions concerning the rights of pre-emptioners under similar circumstances; and there seems to be no reason why the same principle should not apply to locators. The principle seems to be necessarily, even if implicitly, involved in the following decisions:

Yosemite Valley Case, 15 Wall. 77.

Frisbie *v.* Whitney, 9 Wall. 187, 195.

Hutton *v.* Frisbie, 37 Cal. 475, 485, 486.

If I am correct in this view, then Thomas acquired a valid and complete equitable interest in the lands by his original location, even without holding that his subsequent proceeding on December 24th was in reality a second or renewed location.

His original location on June 20, 1853, standing alone, was imperfect and inchoate. But the

lands embracing the tract were soon after regularly surveyed by the U. S. government. These lands were not withdrawn, nor reserved by the government, nor were they granted to any third person. No third person intervened and made any claim to the tract in question. In this condition of facts, Thomas renewed his claim. Even if it was not to all purposes a second and renewed location, the proceeding by Thomas, on December 24, 1853, was, at least, an assertion by him of his claim under the former location; it showed that he had not abandoned his claim; it was a most formal proceeding by him to assert his rights, and to claim all the benefits of the previous location. And so the United States register treated it at the time, and recognized his claim as valid, and his location as completed. And so the U. S. land officers have treated it ever since. Why should not, under these circumstances, the survey relate back and validate the originally imperfect location, and clothe Thomas with a complete equitable interest in the land, especially as against a subsequent claimant who had full notice of all these proceedings?

I will now refer to some authorities in support of these positions.

RELATOR'S TITLE.

If I am correct in either of the foregoing positions; if the proceeding on December 24, 1853, was in reality a second or renewed location by

Thomas; or if such proceeding was only a reassertion of his claim under the original location on June 20, 1853, which was perfected and validated by the subsequent government survey; so that in either view Thomas acquired a complete equitable interest in the tract of land in controversy; then all my positions as to the nature and effect of his equitable rights as against the State and as against the defendant are fully sustained by a decision of the Supreme Court of California, upon a case arising under this same statute of Congress.

Bludworth *v.* Lake, 33 Cal. 255, 261-263.

The court hold the following propositions:

"The State, by the act of Congress, received a present grant of 500,000 acres, to be selected out of such lands as were open thereto, in such a manner as the State, by her legislature, should direct."

"When the selection and location are once made pursuant to the legal directions, of lands subject thereto, the general gift of quantity to the State becomes a particular gift of the specific lands located, vesting in her a perfect title to the same, which title [i. e, the legal title, of course] passes by her patent." That the *legal* title is here meant is clear, because in this very case the court hold that the patent is held by the patentee subject to any equitable interest belonging to another person.

Page 262: "When the State issued warrant No.

198, it sold 320 acres of the 500,000 acres granted to the State by the act of Congress, and authorized the holder, as agent for the State, to locate it for his own benefit, *upon any vacant and unappropriated land belonging to the United States, and subject to such location.* The purchase was made, the consideration money paid by the purchaser and received by the State, and the warrant authorizing the location delivered. Henceforth the purchaser became *the owner of the entire beneficial interest* in that quantity of land. As soon as a valid location of the warrant was made, *the right attached to the specific tract of land selected*, and the legal title at once vested in the State of California, *but for the benefit of the holder of the warrant located.* The purchase from the State had already been made and the land paid for. *The State simply held the legal title, only, without any beneficial interest whatever*, with authority in the State officers to execute a patent to the beneficiary—the real party in interest. *The State held the legal title in trust, only, for the purchas r till the patent should issue.* (People *v.* Shearer, 30 Cal. 648.) When S., in this instance, made a valid location of warrant No. 198, he became the owner of the entire beneficial estate, and the State held the legal title in trust for him."

The Court then decided the following propositions upon the special facts of the case:

"When S. located such warrant, and then conveyed all his interest in the located land to H., and afterwards procured the patent for the same

from the State to himself, he thereby acquired no new interest in the land of an adverse character, subsequent to his conveyance to H., but after he got the patent, he held the naked legal title in trust for H. In such a case, the law raises a trust in favor of the party holding the beneficial estate, which a court of equity will enforce, and this, whether S. intended to commit a fraud in procuring the patent or not. And the failure of the holder of the beneficial estate, H., to appear before the register of the State land office and contest S.'s right to a patent did not conclude him."

If Thomas obtained any equitable interest in the tract in question by his proceedings for a location, then this decision is conclusive in favor of the relator's equitable rights, and relief should certainly be granted to him.

I may remark, that this case shows conclusively that the relator's claim arises directly under statutes of the United States, and not under State statutes The fact that the school land warrants are issued under State statutes does not affect the relator's claim in this action. This decision, and other cases cited in it, show that the act of Congress only gives the State a general gift of quantity of public lands within its territory; the State acquires thereby no interest in any specific lands. It is only when a location is made by the holder of a warrant that the State obtains a vested interest in the specific lands located, which is ripened into a perfect legal title by the subsequent

"listing" of the lands so selected by the United States. The vested interest of the State, as well as the interest of the locator in the specific land selected, *depends upon the act of location*, which location is made upon public lands of the United States situated within the State's territory. Now, whether a location upon such public lands is valid or not, is regulated solely by statutes of Congress, and is determined by U. S. land officials, acting in pursuance of such statutes. It thus appears, beyond a doubt, that the relator's claim arises primarily and directly from statutes of Congress.

The defendant's patent, and his legal title, if any, acquired thereby, are subject to outstanding equities, or equitable interests in the land held by third persons; and the defendant may be declared a constructive trustee for such beneficial owners. The following are a few of the cases which establish this doctrine concerning patents granted by the United States or by the State, however conclusive they may be as to the patentee's legal title.

Castro *v.* Hendricks, 23 How. (U. S.) 441.
Hardy *v.* Harbin, 4 Sawyer, 536, 543–547.
Moore *v.* Wilkenson, 13 Cal. 478, 487, 488.
Estrada *v.* Murphy, 19 Id. 248, 272.
Emeric *v.* Penniman, 26 Id. 119, 124.
Wilson *v.* Castro, 31 Id. 420, 439.
Bludworth *v.* Lake, 33 Id. 255, 263.
Salmon *v.* Symonds, 30 Id. 301, 306, 307.

Second Point.—But assuming that Thomas' original location on June 20, 1853, was imperfect, and was not completely perfected by the subsequent proceeding on December 24th, then it was certainly made valid to all purposes by the curative act of Congress of July 23, 1866, and by the subsequent proceedings of Thomas and of the U. S. land officers.

14 U. S. Stat. at Large, p. 218.
See Appendix, *post*, for copy of this statute.

The first section of this Act of Congress confirms to the State any selections previously thereto made in part satisfaction of any grant by the United States to the State; section 3 deals especially *with locations which have been made in good faith upon unsurveyed lands*, and provides that upon proper proof to the register of the U. S. land office, the lands so selected and located shall be certified over to the State.

The statement of facts shows that Thomas complied strictly with the requirements of this statute. After his original location on June 20, 1853, and after the survey, he made the proper proof to the proper U. S. register, on December 24, 1853, his location was approved and accepted by that register and by all other U. S. officials, and subsequently, in 1870, the lands were duly listed to the State.

My contention is, that, as Jackson's whole proceedings were had before the State acquired

the perfect legal title to the lands, he obtained at most only an equitable interest, which, by reason of his notice, was subject to the prior equitable interest of Thomas. The Act of Congress of 1866, operating upon these lands while they were still public lands of the United States, related back to Thomas' location, cured all its imperfections, and made it perfectly valid, because it was essentially superior to Jackson's. The State thereupon became a trustee of an express trust for Thomas, and when the State finally obtained the perfect legal title by the "listing," it held that legal title in trust for Thomas' successor, Hastings, and was bound to give *him* a patent of the tract in question.

The State Court dismisses this question in a very summary manner, by assuming that Jackson had a valid location, and that the Act of Congress did not interfere with any prior valid location. The Court thus assumes the very point in controversy, without citing any authority, and, as it seems to me, with all due respect, without any convincing reasoning. The Court concede that Thomas' location would have been validated by the Act of Congress, had Jackson's location never been made, and this concession in reality gives up the whole controversy. The Court say: "If Jackson's location was invalid, Thomas undoubtedly has the superior right to the land under that act. But we are unable to discover that Jackson's location was invalid. It was not made until after the land had been surveyed, and as we understand

the law, a valid selection and location might then be made, and the person making it be entitled to a patent from the State, whenever the land so selected and located should be certified over to the State by the United States. If this view of the law be correct, it necessarily follows that the Act of Congress cannot be successfully invoked in behalf of the relator. No one will maintain, we think, that the act can be so construed as to affect a valid location made prior to its passage." What the Court add is a mere repetition of the foregoing.

See opinion in Transcript, at p. 9.

This is merely reasoning in a circle. If Thomas' prior location had been valid, then a subsequent location on the same tract by Jackson, even if made without any notice of Thomas' claim, would clearly have been nugatory. If Thomas' prior location was imperfect, still Jackson's subsequent location was made with full notice and knowledge of Thomas' prior proceedings, and was therefore subject to all the equities and claims of Thomas which could arise out of those prior proceedings. In that condition the Act of Congress comes in, and cures all the defects of Thomas' prior location, makes it valid to all intents and purposes; and Jackson is thus placed in exactly the same position as though Thomas' location had been perfectly valid from the beginning—valid when first made. There is nothing inequitable in such an operation of the statute; it was intended for exactly such

cases, to aid a prior *imperfect* locator in good faith, against a subsequent locator who was charged with full notice of the prior claim The very exceptions in the proviso of § 1 of the Statute confirm this view.

It is a complete and sufficient answer to the reasoning of the Court below, that it utterly ignores the fact of Jackson's having full knowledge and notice of Thomas' rights; it treats Jackson as though he were acting in good faith and without notice. I submit that this view alone disposes of the decision below, and brings the case squarely within their own admission.

But there is a broader view. Jackson, even by his patent from the State before 1870, when the lands were listed to the State, acquired at most only an equitable interest in the tract, which equitable interest, by reason of his notice, was *essentially* subordinate to the prior equity of Thomas. The Act of Congress of 1866 cured all defects in Thomas' location, made that location perfect, and gave Thomas an absolute right to a patent as against the State and as against Jackson.

This proposition is demonstrated by the following decisions, mostly of the California Courts:

I. In regard to this grant of 500,000 acres to the State by the United States, it is the settled doctrine that, while the State may acquire a vested right of some kind to each specific tract of the public lands duly located by means of the very act of a valid location, yet the State does not obtain the

title, i. e., the full legal title, to such specific tracts selected and located until they have been "listed" or certified over to the State by the commissioner of the United States general land office.

Chant *v.* Reynolds, 49 Cal. 217, 218, and cases cited.

Toland *v.* Mandell, 38 Cal. 42.

Hodapp *v.* Sharp, 40 Cal. 69.

Collins *v.* Bartlett, 44 Cal. 381, 382.

5 U. S. Stat. at Large, 455, sec. 8.

10 Id. 346.

Until 1870, when the lands were "listed," the State had no legal title to the tract; she had only the peculiar vested interest resulting from the fact of locating a particular tract, and this interest was at most only an equitable one.

II. The defendant Jackson did not acquire the legal title even by his patent issued in 1863, nearly seven years before the lands were "listed" to the State in 1870. As the State then had only an equitable interest at most, it could convey no more than an equitable interest by its patent.

I think it may even be doubted whether the defendant has any legal title at all under his patent. Between private persons, an after-acquired title of the grantor may sometimes inure to the benefit of a grantee by estoppel; but could an estoppel in such a case operate against the State?

III. In this condition of facts, the Act of Con-

gress of 1866 confirmed, validated, and established Thomas' *prior* although imperfect location. Its language shows that it operates equally upon all purchasers in good faith from the State; it created no distinction between different purchasers of the same land, and it recognizes none. It necessarily gives superiority of claim to the one who has priority of right over the others, either by reason of priority of time or of any other equitable feature. Thomas had both priority of time, and also an equity essentially superior to that of Thomas.

See Le Roy *v.* Cunningham, 44 Cal. 608.

Field *v.* Seabury, 19 How. (U. S.) 332.

1. While Thomas acted with *good faith* in making his original location, and in his subsequent proofs given to the U. S. register on December 24, 1853, Jackson, within the meaning of this act of Congress of 1866, did not act with "good faith," because all his steps to locate, etc., were made with full knowledge and notice of Thomas' prior claim. For this reason alone the act of Congress validates Thomas' location as against Jackson.

2. But Jackson's proceedings in obtaining his certificate from the State land officer, Houghton, and his patent from the State were invalid. He failed to comply with the requirements of the statute; he did not publish the requisite notices; nor give notice to adverse claimants; nor furnish the requisite proofs to the State land officer.

See complaint, Transcript, p. 3, folios 11, 12.

Statutes of Cal. for 1859, p. 338, chap. 313.

See copy of this statute, *post*, in appendix.

3. But Jackson's location has been decided invalid by the commissioner of the U. S. land office; his location was canceled by said commissioner, and his warrants were returned to him. He accepted and acted upon this decision by receiving the warrants *and selling them;* so that these same warrants have in all probability been located again on other tracts.

As to the binding nature of the commissioner's act, see

Gaines *v.* Thompson, 7 Wall. 347.

IV. Thomas' location having been thus validated, the State became a trustee for him of the tract located, and when the State obtained the legal title in 1870, she took it in trust for the relator Hastings, and was bound to give him a patent.

Bludworth *v.* Lake, 33 Cal. 255, 262.

People *v.* Shearer, 30 Cal. 648.

Toland *v.* Mandell, 38 Cal. 42.

Third Point.—This action is not barred by the statute of limitations. The cause of action did not accrue until the State acquired title to the land by "listing," on February 10, 1870. This action was begun on December 12, 1874, less than five years after the State obtained title.

Cal. Code of Civil Proc., §§ 315, 316.

See *post*, appendix, for copy of these sections.

AS TO THE FEDERAL JURISDICTION.

Fourth Point.—The supreme court of the United States has an appellate jurisdiction of this case. It is properly before this court on writ of error to the supreme court of California. The decision of the case necessarily involves, and the record clearly presents, a "federal question," which the court below necessarily passed upon adversely to the plaintiff in error. The title or right of the plaintiff in error in this case is claimed under a statute or statutes of the United States, and the decision of the court below is against such right and title.

U. S. Rev. Stat., § 709.

The title of the plaintiff in error and of the relator is claimed under the act of Congress of July 23, 1866, above mentioned; the act of Congress granting 500,000 acres to the State; and acts of Congress regulating the public lands, etc.; and the decision of the State court is necessarily adverse to such claim. All this sufficiently and necessarily appears on the record itself. It is not necessary to state in terms that the law was drawn in question.

Williams *v.* Norris, 12 Wheat. 117.
Montgomery *v.* Hernandez, 12 Wheat. 129.
Ryan *v.* Thomas, 4 Wall. 603.
Furman *v.* Nichol, 8 Wall. 44.
Willson *v.* Marsh Co., 2 Peters, 245.
Farney *v.* Towle, 1 Black, 350.

The fact that other questions were also involved, growing out of State laws, does not destroy this appellate jurisdiction, if the case shows that a federal question was involved.

Maguire *v.* Tyler, 8 Wall. 651.

Minnesota *v.* Bachelder, 1 Wall. 109.

See Desty's Federal Procedure, p. 333, and cases cited.

In conclusion, I respectfully submit that the decree of the State court should be reversed, and a decree should be made establishing the relator's title to the land in controverey.

JOHN NORTON POMEROY,

Of Counsel for the Relator and the Plaintiff in Error.

APPENDIX.

STATUTES REFERRED TO IN THIS ARGUMENT.

Act of Congress of June 23, 1866, chap. 219, U. S. Statutes at Large, p. 218.

"§ 1. Be it enacted, etc., that in all cases where the State of California has heretofore made selections of any portions of the public domain in part satisfaction of any grant made to said State by any Act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State; *provided*, that no selection made by said State contrary to existing laws shall be confirmed by this Act for lands to which any adverse pre-emption, homestead, or other right has, at the date of the passage of this Act, been acquired by any *settler* under the laws of the United States; or to any lands which have been reserved for naval, military, or Indian purposes by the United States; or to any mineral lands; or to any lands held or claimed under any valid Mexican or Spanish grant; or to any land which, at the time of the passage of this Act, was included within the limits of any city, town, or village, or within the county of San Francisco; *and, provided further*, that the State of California shall not receive under this Act a greater quantity of land for school or improvement purposes than she is entitled to by law."

"§ 2. And be it further enacted, that when the selections named in § 1 of this Act have been made upon land which has been surveyed by authority of the U. S., it shall be the duty of the proper authorities of the State, when the same has not already been done, to notify the register of the United States land office for the district in which the land is located, of such selection, which notice shall be regarded as the date of the State's selection, and the commissioner of the general land office shall, immediately after the passage of this Act, instruct the several local registers to forward to the general land office, after investigation and decision, all such selections, which, if found to be in accordance with § 1 of this Act, the commissioner shall certify over to the State in the usual manner."

"§ 3. And be it further enacted, that when the selections named in § 1 of this Act have been made from land which has not been surveyed by the authority of the U. S., but which selections have been surveyed by authority and under laws of said State, and the land sold to purchasers in good faith under laws of the State, such selections shall, from the date of the passage of this Act, when marked off and designated in the field, have the same force and effect as the pre-emption rights of a settler upon unsurveyed public lands; and if upon surveying of such land by the U. S. the lines of the two surveys shall be found not to agree, the selection shall be so changed as to include those legal subdivisions which nearest conform to the identical land included in the State survey and selection. Upon filing with the register of the proper U. S. land office of the township plat in which any such selection of unsurveyed land is located, the holder of the State title shall be allowed the

same time to present and prove up his purchase and claim under this Act as is allowed pre-emptors under existing laws; and if found in accordance with § 1 of this Act, the land embraced therein shall be certified over to the State by the commissioner of the general land office."

The remaining sections of this act (§§ 4-9) relate to swamp and overflowed lands, etc., etc., and have no possible bearing upon this case.

CALIFORNIA STATUTE AS TO PATENTS FOR SUCH LANDS.

Act of April 16, 1859.

Statutes of California for 1859, p. 338, chap. 313, "An Act to provide for the issuance of patents to lands located with State school land warrants," etc.

Section 1. *Patents to be Issued.*—In all cases where school land warrants have been issued in pursuance of the act approved May 3, 1852, entitled "An Act to provide for the disposal of the 500,000 acres of land donated to this State for school purposes, by Act of Congress approved April 4, 1841," and the same shall have been or may be hereafter located upon any of the public lands within this State, subject to such location, and in conformity with the provisions of said act, or of an act approved April 30, 1857, providing for the location and patenting of school lands, or where parties have purchased lands under the act of April 23, 1858, and obtained the certificate of purchase of the register of the State land office, the holder of such warrant or certificate of purchase, his, her, or their heirs or assigns, upon complying with the provisions of this act, shall be entitled to receive a patent from the State for the lands thus located or purchased. In all cases where school land

warrants, issued in pursuance of the act of May 3, 1852, have been located upon lands in the manner required by the circular of the general land office of August 6, 1857, in relation to selections of school lands, the location shall be deemed to have been made in pursuance of said act of May 3, 1852.

Sec. 2. *Evidence.*—The holder of a warrant or certificate of purchase, desiring a patent, shall be required to produce to the register of the State land office proper evidence to show:

First. That such warrant has been located in conformity with the provisions of the act under which the same purports to have been located.

Second. That the lands have been duly surveyed by authority of the United States government, and the plats of such survey have been approved by the surveyor-general, and that the location conforms to such survey.

Third. That the location of such warrant has been made or filed in the United States land office, for the district in which the land is situated, and the location made with the consent of the register and receiver of such land office, and at least ninety days have elapsed since said location, or if said applicant holds a certificate of purchase, he shall prove to said register that the lands have been purchased in accordance with the Act of the 23d April, 1858, and that the purchase money, and all interest due thereon, has been fully paid, and that notice of such application has been made by publication in a public newspaper, published within the county in which such lands are situated, for at least four weeks next preceding such application, or if no newspaper is so published, then by written notices, posted in two conspicuous places on the lands so applied for, and one on the court-house door of the county, and upon such proof of the

foregoing facts, all persons holding adversely may be entitled to appear before the register and contest the application for such patent. This section shall be construed to authorize and permit purchasers to pay in cash for lands purchased under the Act of the 23d of April, 1858.

Sec. 3. *Certificate of Location.*—Upon the production of the evidence required in section 2 of this Act, the register of the State land office shall issue to the applicant his certificate of the proper location of such warrant upon the tract or tracts of land described in such location, or if the holder of a certificate of purchase, that all the principal and interest due thereon has been paid, and that the applicant is entitled to receive a patent for the lands described in the location of said warrant, or in said certificate of purchase; but no such certificate shall issue, until the warrant or certificate of purchase upon which the same is to be issued, shall be surrendered to said register.

Sec. 4. Upon the production of the certificate of the register of the State land office, as provided in section 3 of this Act, the Governor of the State shall issue a patent to the purchaser entitled thereto for the lands described in said certificate, which shall be signed by him and countersigned by the register of the State land office, and he shall affix the seal of his office thereto. Such patent shall vest in the grantee therein named a good and valid title in fee simple to the lands therein described.

Sec. 5. *Canceled.*—All warrants or certificates of purchase surrendered under the provisions of this Act shall be canceled by the register by writing on the face thereof, "canceled," and shall note the lands upon which the same have been located, and by whom, and shall also note upon the official plats in his office the lands thus selected. The

warrants or certificates of purchase thus canceled shall be kept on file in the office of said register of the State land office. The land thus patented shall be deemed to be in part satisfaction of the grant of the 500,000 acres of land donated to this State for school purposes by Act of Congress.

Sec. 6. *Fees.*—The register may charge and receive for issuing the certificate required by section 3 of this Act the sum of three dollars.

Sec. 7. *Repealing Clause.*—All Acts and parts of Acts conflicting with the provisions of this Act are hereby repealed.

Sec. 8. *Lands Exempted.*—Nothing in this Act shall be construed so as to authorize or confirm the location or purchase of any of the mineral, swamp, or overflowed lands in this State as school lands.

CALIFORNIA STATUTE OF LIMITATIONS.

California Code of Civil Procedure, §§ 315, 316.

"§ 315. The people of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless, 1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or 2. The people or those from whom they claim shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years."

"§ 316. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this State, unless the same might have been commenced by the people, as herein specified, in case such patent had not been issued or grant made."

112-233

No. .....

In the Supreme Court

—OF THE—

UNITED STATES

The People of the State of California, on the information of J. L. Love, Attorney General, at the relation of S. C. Hastings,

Plaintiff in Error

vs.

A. P. Jackson and John Devlin,

Defendants in Error

In Error to the Supreme Court State of California

BRIEF FOR THE DEFENDANTS IN ERROR.

M. A. WHEATON,

Of Counsel for Defendants in Error.

Filed this ..... *day of* ..... *A. D. 1884*

..... *Clerk.*

By ..... *Dep. Clerk.*

Women's Print, 424 Montg'y St. S. F.

SUPREME COURT

— OF THE —

UNITED STATES.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex relation* S. C. HASTINGS,
Plaintiff in Error,

vs.

A. P. JACKSON and JOHN DEVLIN,
Defendants in Error.

Brief of the Defendants' in Error.

This action is brought to this Court from the Supreme Court of the State of California by writ of error.

The action is a reproduction of a case which has been several times brought before, and has always been decided in defendants' favor. We believe every material point now presented has been decided by the Supreme Court of California and between these same parties in the following former adjudications, viz :

People ex rel., Hastings v. *Jackson*, 24 Cal., 630.

Hastings v. *Devlin and Jackson*, 40 Cal., 358.

Hastings v. *Jackson and Devlin*, 46 Cal., 234.

The complaint in this case charges, that in June, 1853, Isaac Thomas desired to locate a School Land Warrant upon the south half of Sec. 14, T. 5 north, range 1 west, and caused the land to be surveyed by a County Surveyor, and a certificate thereof filed in the office of the Clerk of the County Court of Solano County.

That the lands were surveyed by the U. S. Government the first of the next October.

That in December, 1853, the said location was presented to the Register of the U. S. Land Office, and was by him accepted and approved.

That subsequently the warrant was filed in the U. S. Register's Office, and the word Surrended written across the face of it, and the Register issued his certificate of the fact.

That in 1858, or 1859, the plaintiff obtained a Sheriff's deed for Isaac Thomas' title to the land.

That in February, 1857, the defendant, Jackson, located two 160-acre School Land Warrants on the land, and in March, 1863, obtained a patent for the land from the State of California.

That Jackson took, with notice of the Thomas location and plaintiff's rights.

That the land was listed to the State February 10, 1870.

That in September, 1871, the U. S. Land Commissioner canceled Jackson's location, and sent back to him the warrants he had located on the land.

That after the patent was issued to Jackson, he sold and conveyed the land to the defendant John Devlin.

The defendants demurred to this complaint, upon the grounds:

1st. That it does not state facts sufficient to constitute any cause of action; and

2d. That it shows the action is barred by the Statute of Limitation.

The Court sustained the demurrer; the plaintiff declined to amend his complaint, and a final judgment was thereupon entered for the defendants.

Argument.

The defendants in error deny that this Court has any jurisdiction of the questions raised by the demurrer in this case. It has no jurisdiction over the subject matter of the suit, nor of the defendants. In the issues of law raised by the complaint and demurrer, there is not drawn in question the validity of any treaty or of any

statute of the United States, or of any authority exercised under the United States, nor has the decision been against the validity of any treaty, or any statute, or any authority exercised under the United States. Neither has there been any decision in favor of the validity of any statute of any State, or of any authority exercised under any State, where the validity of such statute or such authority has been drawn in question on the ground that they were repugnant to the Constitution, or treaties, or laws of the United States. Neither has any decision been made against any title, right, privilege or immunity specially set up or claimed by either party under the Constitution, or any treaty, or any statute of, or commission held, or authority exercised under the United States.

There is, therefore, no question involved in the case, which this Court can examine on a writ of error issued to the highest Court of a State.

U. S. Revised Statutes, section 709.

The eighth section of the pre-emption law of Congress of September 4th, 1841, granted to each new State when it should be admitted into the Union, 500,000 acres of land for purposes of internal improvements, and provided that the lands should be selected within the limits of each state "in such manner *as the Legislature thereof* "*shall direct.*"

Section two of article nine of the Constitution of California, under which Congress admitted her into the Union as a State, diverted this 500,000 acre grant from "internal improvement" purposes to school purposes.

The State of California passed various laws providing for issuing school land warrants, and for having the lands selected for the State, and for issuing State patents to purchasers from the State.

The relator, S. C. Hastings, claims a right to purchase *from the State under the provisions of the laws of the State only.* He does not claim as a purchaser from the United States, nor as a purchaser or locator under any law of Congress. No law of the United States said a word about such land warrants as are mentioned in the complaint, or about their location. *They were State land warrants only. They were issued only under State laws. They could be located only under the provisions of State laws*, since Congress had not mentioned them in any law, and in fact knew nothing about them, and *no rights flowed from locating these warrants except such rights as the State laws alone provided for.*

to individuals

The United States' officers of the General Land Offices recognized these warrants and allowed State selections of land to be made under them. They listed the lands so selected to the State. This was all they could do, under the law of Congress.

The title passed to the State. Hastings and Jackson *both claim from the State as a common grantor*, and they both claim their rights under the laws of the State and in no other way.

There is not a word or line in the complaint that sets up any claim under, or any compliance with the terms of any United States law. In fact there is not a United States law referred to, or mentioned in the complaint at all, except, that near the beginning of the complaint it quotes the title of a State law, and the title of the State law thus quoted, includes a reference to section eight of the pre-emption law of September 4th, 1841. (It is misquoted as 1851, in the complaint.)

Where both parties claim under a common grantor, whose title under the United States is admitted, this Court has no jurisdiction.

Romie et al., vs. Casanova 91, U. S. 379.
McStay, vs. Friedman, 92 U. S. 723.

The statute of limitations of the State of California is set up in the demurrer. This is in accordance with the decisions of the California Courts.

Smith vs. Richmond, 19 Cal., 481.
Barringer vs. Warden, 12 Cal., 311.
Sublette vs. Tinney, 9 Cal., 423.

Although the question of statutory limitation is not mentioned in the opinion of the Court, it

may have been the basis of its judgment. This was purely a State question, upon which the judgment of the California Supreme Court may have rested. In such cases the Supreme Court of the United States will not review the judgment.

Kennebeck Railroad vs. Portland Railroad, 14 Wallace, 23.

Kingler vs. State of Missouri, 13 Wallace, 257.

There is no Federal question raised in the complaint, and no Federal question is decided by the Court.

The Act of Congress of July 23d, 1866, printed in the appendix of plaintiff's brief, is not mentioned in the complaint at all. If it had been so mentioned it would not help the plaintiff's case, since all that that Act does is to *confirm to the State* certain invalid selections. The complaint shows that the land in dispute was selected by the State and was listed to the State. It makes no difference whether this was done under the Act of July 23d, 1866, or some other Act. The State's title to the land was good, and all the provisions of any and all the Acts of Congress were fully complied with and exhausted when the title was vested in the State. No Act of Congress provides for the disposal of the land by the State, and every disputed question in this

case relates only to the question as to who had the right of purchase from the State, *under the laws of the State*, of the land in dispute.

The decision of the Supreme Court of California is right, and is of itself a sufficient argument to sustain the correctness of its judgment.

M. A. WHEATON,
Of Counsel for the Defendants in Error.

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ARKANSAS

TEXAS

EIGHTH STREET.
SEVENTH STREET.
SIXTH STREET
FIFTH STREET.
FOREST STREET
CLINTON STREET
BROAD STREET
AVENUE
LINE
VINE
STATE
PINE ST
FRONT ST
ELM ST
WALNUT ST
HAZEL ST
LAUREL ST
ASH ST
BEECH ST
PECAN ST
HICKORY ST
LOCUST ST
OLIVE ST
DEPOT GROUND
ROUND HOUSE
CAIRO AND FULTON R.R
T & P.R.W
PASSENGER
FREIGHT DEPOT
STOCK YARD
SECTION LINE

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UNITED STATES OF AMERICA.

IN THE SUPREME COURT.

JOHN FOSTER, Plaintiff in Error. vs. THE STATE OF KANSAS, EX REL., W. A. JOHNSTON, ATTORNEY GENERAL, Defendant in Error.	Notice of motion to dismiss, united with motion to affirm.

To JOHN FOSTER, Plaintiff in Error:

You will hereby take notice that Defendant in Error will call up and present for hearing in said Court on Monday, October 13th, 1884, at ten o'clock A. M., or as soon thereafter as Counsel can be heard, its motion to dismiss the writ of error allowed in the above entitled cause united with a motion to affirm the judgment of the Supreme Court of Kansas.

A copy of said motion is hereto attached.

GARVER & BOND,
Of Counsel for Defendant in Error.

Service of above notice acknowledged this 15th day of September, A. D. 1884.

CHAS. A. HILLER,
Of Counsel for Plaintiff in Error

UNITED STATES OF AMERICA.

IN THE SUPREME COURT.

JOHN FOSTER, Plaintiff in Error. vs. THE STATE OF KANSAS, ON RELATION OF W. A. JOHNSTON, ATTORNEY GENERAL, Defendant in Error.	Motion to Dismiss, and to Affirm.

Comes now said Defendant in Error and moves the Court to dismiss the writ of error in the above entitled cause for the reasons following:

1st. It does not appear from the record that the constitutionality of the sections of the statute referred to and commented on by the Court, was necessarily drawn in question, or that the decision of the court was based upon their not being repugnant to the constitution of the United States.

2nd. The record does not show that Plaintiff in error, in the Supreme Court of Kansas, set up any special right under, or that he claimed that the particular sections of the statute referred to, were repugnant to, any special provision of the constitution of the United States.

3rd. The record does not show that the Supreme Court of Kansas was called upon to consider, or that it decided as to the validity of the statute under any special provision of the constitution of the United States.

In connection with the above, and in case the same is over-ruled, Defendant in Error moves the Court to affirm the judgement of the Supreme Court of Kansas, for the reason that it is manifest the writ was taken for delay only, and the question on which the jurisdiction of this Court depends is so frivolous as not to need further argument.

W. A. JOHNSTON,
Attorney General.

GARVER & BOND,
Of Counsel.

Service Acknowledged September 15th, 1884.

CHAS. A. HILLER,
Of Counsel for Plaintiff in Error.

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